

E-FILED 05-09-2011

NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN RE COMUNITY LENDING,
INCORPORATED,

No. C08-00201 JW (HRL)

Debtor

**CONDITIONAL ORDER RE
PLAINTIFFS' MOTION TO COMPEL
DEPOSITION OF ALLEN
CHRISTENSEN**

CHRISTINA PHAM, et al.

Plaintiffs,

**ALTERNATIVE REPORT AND
RECOMMENDATION RE
EVIDENTIARY SANCTIONS**

v.

COMUNITY LENDING INCORPORATED

Defendant.

[Re: Docket No. 150]

AND RELATED CROSS-ACTIONS

Plaintiffs have for years been interested in deposing Allen Christensen, the former Chief Financial Officer of defendant ComUnity Lending, Inc. (ComUnity). ComUnity previously was represented by the Murray & Murray law firm, who told plaintiffs that they also represented Christensen with respect to his noticed deposition. After the bankruptcy court converted ComUnity's Chapter 11 proceeding to a Chapter 7 liquidation, Trustee John Richardson was appointed, and the Luce Forward Hamilton & Scripps firm was appointed as the Trustee's counsel. Christensen's deposition never went forward because, shortly after, the court granted summary judgment in plaintiffs' favor and the Trustee appealed.

1 After the Ninth Circuit's remand, plaintiffs renewed their request for Christensen's
2 deposition. Initially, Trustee's counsel did not object to the dates proposed by plaintiffs,
3 indicated that they would check on Christensen's availability for deposition, and stated that
4 Christensen had advised them that mid-March or later was best for him. (Borden Decl. Ex. 13).
5 Plaintiffs say that such communications led them to believe that opposing counsel would
6 produce Christensen for deposition—that is, up until a few days before the noticed deposition
7 date when the Trustee advised that he did not represent Christensen and could not require him
8 to appear for a deposition. (Id.). The deposition did not proceed as noticed, and plaintiffs say
9 that their efforts to find and subpoena Christensen on their own have been unsuccessful. (See
10 Lindstedt Decl. ¶¶ 2-6). The Trustee says that he has Christensen's cell phone, but no other
11 information as to his whereabouts—except to say that Christensen reportedly is now somewhere
12 in Idaho tending to his mother.

13 There seems to be no dispute that Christensen is an important witness. This court is told
14 that he prepared statements pertaining to ComUnity's financial condition during the relevant
15 period at issue in this action, and also submitted a declaration that ComUnity relied upon in
16 summary judgment and in the Ninth Circuit appeal. Additionally, plaintiffs say that defense
17 experts rely on documents prepared by Christensen; that Christensen is listed on the defense list
18 of witnesses; and that the Trustee refuses to serve Fed. R. Civ. P. 26(e) supplemental or
19 amended disclosures as to Christensen in any way.

20 The Trustee claims that he does not control Christensen and, further, that Christensen
21 wants nothing to do with the Trustee and refuses to speak with Trustee's counsel.¹
22 Nevertheless, it seems that, at a minimum, the Trustee breached a good faith obligation to give
23 plaintiffs all contact information available to him re Christensen, particularly when the Trustee
24 has listed Christensen among its own witnesses. At oral argument, Trustee's counsel indicated
25 that he knows of sources at Diablo Management Group (DMG), or possibly other unexplored

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27 ¹ For this reason, the Trustee repeatedly suggested at oral argument that he is
28 justified in refusing to produce Christensen as a Fed. R. Civ. P. 30(b)(6) witness. But, the
record indicates that plaintiffs are seeking to depose Christensen only in his individual
capacity. (See Borden Decl. Ex. 14).

1 sources, who might have additional information as to where Christensen might be found. The
2 Trustee says that he did not provide this information to plaintiffs because they never asked him
3 for it.

4 Discovery is now closed. And, trial is set to begin in just under a month. Although the
5 instant motion is styled as one to compel Christensen's deposition, plaintiffs now believe that
6 evidence preclusion is the only viable remedy.

7 In the interests of resolving this action on the merits, this court finds that plaintiffs
8 should be given an opportunity to locate and depose Christensen. This order, however, is
9 conditioned on the presiding judge's determination that the period for fact discovery and expert
10 disclosures should be re-opened to permit plaintiffs an opportunity to take the deposition and to
11 prepare expert disclosures that take that testimony into account. Additionally, this court
12 recommends that a special master be appointed to address any further discovery disputes that
13 may arise.

14 Alternatively, if the presiding judge decides that modification of the scheduling order is
15 not warranted, then this court recommends that he consider imposing evidentiary sanctions
16 which may be requested by plaintiffs, including that the Trustee be precluded from offering at
17 trial any testimony or evidence from Christensen, or any expert opinions based on Christensen's
18 testimony or documents prepared by Christensen.

19 Dated: May 9, 2011

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21 _____
22 HOWARD R. LLOYD
23 UNITED STATES MAGISTRATE JUDGE
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1 5:08-cv-00201-JW Notice has been electronically mailed to:

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13 Counsel are responsible for distributing copies of this document to co-counsel who have not
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